

Ma (Migration) [2018] AATA 3716 (19 July 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Li Ma
Master Zhe Yang

CASE NUMBER: 1731802

DIBP REFERENCE(S): BCC2016/4331305

MEMBER: Antoinette Younes

DATE: 19 July 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision to cancel the first named applicant's Subclass 100 (Spouse) visa.

The Tribunal has no jurisdiction with respect to the other applicant.

Statement made on 19 July 2018 at 3:11pm

CATCHWORDS

Migration – Cancellation – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) – Incorrect information – Previous marriage and child of previous marriage not declared – Divorced from sponsor – Convention on the Rights of the Child – No breach of Australia's obligations – Family ties in China – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 101, 107, 109(1), 140(2), 359AA, 375A
Migration Regulations 1994, r 2.41

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the first named applicant's Subclass 100 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant has not complied with s 101 of the Act which provides that a non-citizen "*must fill in or complete his or her application form in such a way that: (b) no incorrect answers are given or provided.*" The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. For the purposes of the Tribunal's jurisdiction, the only decision that is before the Tribunal is that with respect to the first named applicant (the applicant). The other visa was cancelled as a consequence of that cancellation, but by the operation of s.140(2) of the Act. The only application for review before the Tribunal relates to the delegate's decision of 12 December 2017 regarding to the applicant. There is no reviewable decision in relation to the second applicant before the Tribunal and therefore the Tribunal has no jurisdiction with respect to the other applicant.
4. The applicant appeared before the Tribunal on 3 and 11 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Han Yan Ji, the applicant's former husband who had sponsored her for the visa. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

7. Section 375A Certificate

8. In the course of the hearing, the Tribunal discussed with the applicant the existence of a non-disclosure certificate pursuant to s 375A of the Act. The Tribunal explained that it considered the certificate to be valid in that the certificate provides a public interest reason which is specified with sufficient detail to identify the claimed harm which could result from its release. The Tribunal advised that the certificate contains sufficient detail to properly identify a basis of public interest immunity. The applicant did not make submissions in relation to the certificate.
9. In accordance with s 359AA, the Tribunal advised the applicant that in the documents subject to the s 375A certificate, there is information that the applicant had claimed that she had authorised her mother-in-law to prepare the documents for her subclass 309 application and that she was afraid that her mother-in-law would disagree with the marriage so she did not tell her mother-in-law about her previous marriage and her child. The Tribunal indicated that this would appear to be inconsistent with the subsequent claim that a person by the name of Barry had assisted in the completion of the form. The applicant indicated that her mother-in-law does not speak English so Barry had assisted in the completion of the form. The Tribunal is persuaded and has decided not to draw any adverse conclusions on the basis of this inconsistency.
10. Furthermore, the Tribunal indicated that there is information in the material subject to the certificate that in her application for citizenship, the applicant did not disclose her previous

known name of *Yihong MA*. The applicant explained that this was her nickname. The Tribunal accepts this explanation and has not drawn any adverse conclusions on this basis.

11. Consequential cancellation

12. The Tribunal advised the applicant that the decision before the Tribunal does not include the consequential cancellation of her son's visa which appears to have been cancelled pursuant to s 140 (2). The Tribunal advised the applicant that cancellations under s 140(2) do involve a 'decision', but there is no separate decision in relation to her son before the Tribunal which means that the Tribunal is only reviewing the decision relating to the applicant.
13. The applicant explained that there was a separate decision in relation to her son. She indicated that she did not provide documents in relation to her son to her representative.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
15. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
16. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

17. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s 101(b) of the Act in the following respects:

18. Section 101 visa application to be correct

19. In the course of the hearing, the Tribunal referred to the fact that in support of the application for review, the applicant provided to the Tribunal a copy of the delegate's decision record. The Tribunal discussed with the applicant the following matters noted in the delegate's decision record:
 - (a) On 17 August 2011, the applicant lodged a combined application for a class UF subclass 309 Partner (Provisional) / class BC subclass 100 Partner (Migrant) visa (Partner visa application). She was sponsored by her Australian husband Mr Ji Han Yao who was born on 11 June 1983.
 - (b) In the Partner visa application, at question 23 of Form 47SP which asks "*Have you ever been married before?*", the applicant replied that she had not been married previously. In response to question 24 of that Form

asking “*Have you ever been in a same-sex or opposite-sex de facto relationship before?*”, the applicant responded that she had not. In response to question 38 of the Form which asks “YOUR CHILDREN”, the applicant responded that she had “NIL”.

- (c) Based on the information provided by the applicant, on 16 January 2012, the delegate approved the subclass 309 Partner (Provisional) visa. On 2 September 2013, the delegate approved the subclass 100 Partner (Migrant) visa.

- 20. The applicant confirmed the information outlined above.
- 21. The Tribunal discussed with the applicant that the delegate’s decision record refers to subsequent information that appears to contradict the information she had provided in the Partner visa application.
- 22. Specifically, the Tribunal indicated that on 16 February 2015, in support of an application for a class AH subclass 101 Child visa application lodged by Master YANG Zhe born on 15 December 2006, the applicant lodged a Form 40CH *Sponsorship for a Child to Migrate to Australia*. In the application, the applicant indicated that Master YANG Zhe is her natural child. In support of the sponsorship application for the class AH subclass 101 Child visa lodged by Master YANG Zhe, the applicant provided:
 - (a) Notarised birth certificate and its English translation of Master YANG Zhe, confirming his place and date of birth.
 - (b) Paper of Civil Mediation and its English translation issued by the People’s Court of Yixiu District, Anqing City China, dated 28 January 2014. Amongst other things, the document refers to a custody dispute between the applicant and Mr Ding Fei which commenced in December 2013, her divorce in September 2008 and the agreement between the parties that YANG Zhe would live with Mr Ding Fei until he could live independently. The document also refers to an agreement between the parties to vary the custody arrangements so that the child can live with the applicant overseas.
 - (c) Undated written statement of the applicant explaining the reasons for her sponsoring her son. She explained that she divorced in 2008 for lack of compatibility. At that time her parents-in-law and her former husband took care of her son who was one year of age. In 2014, her former husband was imprisoned and she doubted his ability to bring up their son. She is now ready to raise her son.
- 23. The applicant agreed that she had been married previously and that she has a son.
- 24. On the evidence before it, the Tribunal finds that the applicant provided incorrect information in the application for the Partner visa at questions 23 and 38 of Form 47SP in that she did not disclose the fact that she had previously been married and that she has a child.
- 25. In relation to Question 24 the Form asking “*Have you ever been in a same-sex or opposite-sex de facto relationship before?*”, the Tribunal is satisfied that the applicant’s response that she had not is correct as she had not been in such a relationship; she was previously married. The Tribunal has noted the evidence that the applicant married her first husband on 23 May 2006, approximately six months before the birth of her son, however, on the basis of the available information, the Tribunal is not satisfied that prior to the marriage in May 2006, she and the first husband were in a de facto relationship as defined.

26. For these reasons, the Tribunal finds that there was non-compliance with of s 101 of the Act by the applicant in the way described in the s 107 notice. The applicant has provided explanations as outlined below.

Should the visa be cancelled?

27. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s 107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s 109(2).
28. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s 107 notice about the non-compliance, and have regard to any prescribed circumstances: s 109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- ***the correct information***

29. In the Partner visa application, at question 23 of Form 47SP which asks "*Have you ever been married before?*", the applicant should have answered that she had been married previously. In response to question 38 of the Form which asks "*YOUR CHILDREN*", the applicant responded that she had "*NIL*" which is incorrect because she has a child who was in existence at the time.
30. The Tribunal is of the view that the correct information is significant and its non-disclosure weighs heavily against the applicant. The Tribunal gives significant weight to this consideration in deciding to cancel the visa.

- ***the content of the genuine document (if any)***

31. There is no evidence of non-compliance with s 103 of the Act. Accordingly the Tribunal gives no weight to this consideration.

- ***whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document***

32. In submissions dated 22 November 2016, it was contended that had the applicant provided the correct information in her visa application, she nevertheless would have been granted the visa. The representative argued that the provision of the incorrect information was not to gain a migration advantage and there was no monetary incentive. The provision of incorrect information was on the lower end of significance and seriousness. The existence of the previous marriage and the child did not preclude the existence of a genuine spousal relationship at the relevant time. The Tribunal is not persuaded by the submissions that the incorrect information was on the lower end of significance and seriousness. Being married previously and having a child are significant pieces of information and to suggest otherwise is unconvincing.
33. The Tribunal is of the view that there is an element of speculation in relation to this consideration. The Tribunal acknowledges that it is not a requirement for the grant of the subclass 309 Partner visa that the visa applicant not to have been married previously or have children. The central issue in the visa subclass 309/100 is whether the relevant relationship is genuine and continuing. The decision-maker would have had to consider whether the relationship of the applicant with Mr Ji, the sponsor, is a genuine and continuing relationship. The applicant was divorced in 2008, approximately three years prior to lodging the Partner visa application. The decision-maker would have had to consider the financial

aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the commitment of the couple. The delegate who assessed the subclass 309/100 visa application did not have the correct information in relation to the applicant's prior marriage and child and therefore the delegate relied on incomplete and incorrect information in assessing the criteria for the visa. Had the delegate known that the applicant had previously been married and has a child, it is reasonable to suggest that the delegate would have turned their mind to whether the sponsor was willing and capable to assist financially, whether the sponsor was prepared to share joint responsibility for the child, and/or whether the sponsor had full knowledge of the applicant's circumstances.

34. Mr Ji gave evidence that he was aware of the former marriage and the child but as this information was not disclosed in the application, it is difficult to be persuaded that the information would not have made a difference to the outcome.
35. On the evidence before it, the Tribunal is satisfied that the decision to grant the visa was based wholly or partly on the incorrect information that the applicant provided. The Tribunal gives this aspect weight in deciding that the visa should be cancelled.

- ***the circumstances in which the non-compliance occurred***

36. The applicant has accepted that she has provided incorrect information in the application for the Partner visa. She has provided a number of explanations as outlined in the material provided to the Department and to the Tribunal. The central explanation provided by the applicant relates to the claim that Mr Ji's family is conservative and would not have accepted her previous marriage or the fact that she has a child.
37. In support of the application for review and to the Department, the applicant provided the following documents:
 - (1) Statutory Declaration of the applicant dated 22 November 2017 in which the applicant describes her marriage to her first husband [Mr Fei Ding]. They were divorced on 16 September 2008 by Court order. She suffered from [depression]. Her parents decided that it would be better for her to go to Japan where she met her second husband Mr Hanyao Ji in April 2010. They decided that it would be best not to disclose to his family that she had been married previously with a child as that would bring shame. Hanyao told her that his parents have conservative values and he was concerned that she would be judged as a divorcee [with] a child. They married and she lodged an application for a Partner visa which contained incorrect information. During mid-2013, she discovered that her former husband was arrested on [criminal] charges. On 28 January 2014, and by Court order she obtained sole guardianship of her son. On 21 November 2014, her former husband was sentenced to a term of 14 years of imprisonment. Her marriage to her second husband did not work out after his family discovered her prior failed marriage and her son. She and her second husband are now divorced.
 - (2) Statutory Declaration of the applicant, dated 26 June 2018. The applicant outlined how she arrived in Australia in 2012 with basic English and that she divorced her second husband in June 2015. She stated that she was not dating anyone. She indicated that:
 - She is an only child her parents are traditional Chinese who treated her very strictly. Her father was the head of police in Anqing, China and has now retired. Her parents emphasised the importance of education and she dedicated herself to study which she enjoyed. She

became a qualified primary school teacher and taught in China. Subsequently, she became a television presenter and became a well-known celebrity in China, particularly in her local community. For much of the year, her mother or father visits her in Australia and they assist her to care for her son.

- She married Mr Fei Ding in 2006 and she found out earlier that year that she was pregnant. Mr Ding appeared to be a good person and he told her that he was a property developer but she later discovered that he was also a [criminal]. They divorced in September 2008 as a result of the pressure from members of her family.
- At the request of Mr Ding's family, the Court in China ordered that her son be with his father and his family. She was desperate and felt hopeless. She was only allowed to visit her son once a month who was looked after by her husband's family up until Mr Ding was arrested for [particular criminal offences] in 2013.
- In April 2008, there was an article published in a tabloid paper about her and Mr Ding's criminal matter (copy of article provided). She felt immense public pressure [but] was rescued. Subsequent to the incident, her family did not put as much pressure on her as they had in the past and they provided her with support.
- In January 2009, she travelled to Japan for about 15 days and later she was granted a Japanese student visa. She went to Japan in April 2010 and she met her second husband, Mr Han Yao Ji who was also known as Victor (sponsor for the Partner Visa). Mr Ji found out about her past. In around August 2010, they became boyfriend and girlfriend.
- The earthquake and tsunami in Japan in March 2011 was shocking and she did not know what to do. In March 2011, she agreed to marry Mr Ji and they got engaged. She came to Australia to meet his family in Adelaide. He told her not to tell his mother about her past marriage because he was afraid that his mother would oppose the marriage. They married in May 2011 shortly after her arrival in Australia. Her son likes Mr Ji who is good with children. They planned to have children of their own but he wanted to get established prior to having a family.
- In August 2011, they started to prepare her application for a Partner Visa. Her English was limited so Mr Ji asked his stepfather known as Barry to assist with completion of the forms. Mr Ji told her not to disclose to Barry her previous marriage or her son because he was concerned that Barry would tell his mother. She had *"no choice, in fact, now idea, but to follow Mr Ji's and Barry's instructions"*. Although she was not sure where she should provide the relevant answers, she did ask Mr Ji several times to tell the truth but he told it would be fine and not to worry. She is regretful.
- Around December 2012, she and Mr Ji's purchased a property and to her knowledge that property has been sold.
- In mid-2013, she discovered that Mr Ding had been arrested and sentenced to a 14 year term of imprisonment. She returned to China and obtained guardianship of her son. In February 2015, she applied

and sponsored her son to Australia who now lives with her. Her son is doing well at school.

- Towards the end of 2012 Mr Ji continued his studies in gaming design and visual art and he was not working at that time. In mid-2014, Mr Ji informed her that he wasn't prepared to find a job in Sydney after his graduation as they had planned. On the contrary, he had planned to return to Japan to finish his studies. She was not sure if he was serious until she noticed that he was starting to apply for schools in Japan and prepare for entrance examinations. She was angry because she thought that after graduation he would start to work. He seemed indifferent about her feelings and did not discuss the future plans. He told her it was his dream and that he would rather separate from her for some years than live a life with no dream or hope. In April 2015, she lodged the divorce application with the help of a family friend called Terry. At that time she was only using the divorce application as a "*tool to ask Mr Ji to stay*" but he had made his final decision and went to Japan. They were divorced in June 2015. She was sad when the divorce was finalised.
 - Mr Ji left to Japan in March 2016 to pursue his studies. Although they are now divorced, they have remained in contact. In around October 2017 he invited her to go to Japan for a 20 day trip (itinerary and hotel bookings attached). They have discussed the possibility of getting back together and remarrying in due course.
 - She sincerely apologises for the mistakes in her visa application and she did not have any *intention* to hide information. Had her English been better, this could have been avoided. Had they appointed a representative to assist with the Partner visa application, this would not have occurred.
- (3) Statement of Mr Hanyao Ji dated 21 November 2017 outlining how he and the applicant met in 2010 in Japan when he was studying. He confirmed his knowledge that the former husband had [proposed] to her in 2011 subsequent to the Japanese earthquake and prior to them finishing their studies in Japan. He stated that at that time, he knew that his family would not approve of the applicant being a divorced woman, with a child and a former husband of criminal background. He stated that his parents helped them in the applicant lodging the application for Partner visa which resulted in the *inadvertent* provision of incorrect information.
- (4) Criminal ruling of the Higher People's Court of Anwei province of 21 November 2014 and its translation (folios 185-224) in relation to [criminal charges] against the former husband.
- (5) Medical certificate dated 30 November 2008 and its translation relating to the applicant's [medical history]. Medical records relating to the applicant for the period from 25 March 2007 until 2 March 2009.
- (6) Work reference for the applicant, dated 15 November 2017 from the Client Service Manager of dnata Airport Services Pty Ltd, noting that the applicant works 38 hours per week
- (7) PAYG payment summaries and Centrelink income statement for the applicant.

- (8) Letter from Oakley public school and school reports for Master Zhe Yang.
- (9) Submissions dated 22 November 2016 acknowledging that incorrect information had been provided. Relevantly the submissions contended that had the applicant provided the correct information in her visa application, she nevertheless would have been granted the visa. The provision of the incorrect information was not to gain a migration advantage and there was no monetary incentive. The provision of incorrect information was on the lessor and of significance and seriousness. The existence of the prime marriage and the child did not preclude the existence of a genuine spousal relationship at the relevant time. The applicant acknowledges that the criminality on the part of the former husband does not *excuse her* from the provision of incorrect information. The applicant was diagnosed with depression [which] eventually *contributed* to the non-compliance. The applicant is currently employed and provides for her child who is studying and progressing well academically. The applicant in the subclass 101 had disclosed the existence of the former marriage and the child which means that the provision of incorrect information was for the *sole reason of protecting herself and her child from discrimination and harm*. The best interest of the child is a primary consideration under the Convention on the Rights of the Child. It is in the best interest of the child that he would continue to have a meaningful relationship with his mother.
- (10) Report of medical oncologist dated 23 May 2018 in relation to Mr Barry Dean Smith, who is the second husband's mother's partner.
- (11) Flight and accommodation details. Copies of photographs of the applicant, her son, Mr Ji and others. The applicant's son appears to be much younger than he is now.
- (12) Article and its translation in relation to the applicant regarding the publication of the applicant's former husband's [criminal] offences.
- (13) Psychologist report of Mr Philip Gorrell, dated 25 June 2018 who interviewed the applicant and her son on 23 June 2018. Mr Gorrell discussed in detail the applicant's background and history of the pregnancy which occurred prior to her being married, causing embarrassment to her and to her family. He referred to the completion of the Partner visa application and the assistance that the applicant received from Mr Barry Smith who was not told of the applicant's former marriage and her son because Mr Smith would have told the applicant's step-mother. Mr Ji apparently [deleted] in December 2012 and the applicant does not know the reasons. The applicant and Mr Ji are trying to reconcile their marriage. Master Zhe Yang was bullied in China because he did not have a mother and because of his father's [criminal] offences. He would be bullied and ostracised if he were to return to China. He is doing well at school in Australia. Mr Gorrell referred to the applicant's background, having come from a good family with her father formally holding a senior position in the police service in China. Mr Gorrell noted that the applicant was a victim of trauma consequential to the Japanese earthquake in 2011 and she was reliant on Mr Ji for guidance. He assessed her as being "*very genuine, very law-abiding and very positive about how she will continue contributing to Australia*".
- (14) In a Statutory Declaration declared on 22 February 2018, Mr Han Ji discussed his relationship with the applicant and the fact that he was aware that she had previously been married and that she had a son. Mr Ji referred to asking his

stepfather, Mr Barry Dean Smith to help with the partner visa application and that he had told her not to disclose her prior marriage or son, fearing that Mr Smith would disclose that information to Mr Ji's mother. He indicated that during the first three years of their marriage, they got along well and they planned to have a child but due to financial difficulties, they delayed that decision. They purchased a property as joint tenants in December 2012 but that property was later sold in June 2015 following their divorce.

38. In the course of the hearing, the applicant reiterated the central points of those explanations. The Tribunal accepts that the applicant was married previously and that she was divorced in 2008. The Tribunal accepts that the applicant and Mr Ji met in Japan. There are copies of photographs before the Tribunal of the applicant, Mr Ji and the applicant's son who appears to be much younger than he is now. Although the Tribunal does not claim to be an expert in determining age but it is clear from the photographs that the child would have been about four or five years old, consistent with the claim that Mr Ji had knowledge of the fact that the applicant had a child. The applicant confirmed that the photographs were taken in around 2011. The Tribunal accepts the evidence that Mr Ji's family is conservative and would have been concerned to know that the applicant had been married previously and that she has a child. The Tribunal accepts the evidence that the applicant had [deleted] and that it is plausible that the child was bullied at school in China.
39. As discussed in the course of the hearing, s 99 of the Act provides that, amongst other things, any information that a non-citizen gives or provides, or causes to be given or provided, or that is given or provided on their behalf in relation to the non-citizen's application for a visa, is taken to be information given or provided to be an answer to a question in the non-citizen's application form. Although the Tribunal accepts as plausible that Barry had completed the forms, he clearly did so upon instructions. The applicant has accepted that she withheld information but she is explaining why she did so. The Tribunal is satisfied that the applicant had intentionally provided incorrect answers to the relevant questions in the application.
40. The Tribunal has carefully considered her explanations particularly the concern about Mr Ji's family but the Tribunal does not find those explanations persuasive or convincing. The Tribunal is of the view that it is clear that there is an obligation to provide correct information in an application for a visa. The Tribunal does not wish to sound harsh, however, the integrity of the migration program and respect for Australia's laws mean that the provision of correct information to the authorities is an important consideration.
41. In oral submissions, the representative contended that the provision of incorrect information was *beyond the control of the applicant*. The Tribunal does not agree with those submissions. The Tribunal refers to the comments made by Mr Gorrell that at the relevant time, the applicant spoke no English and that she was a victim of trauma as a result of the Japanese earthquake in 2011 and that she was reliant on the advice of Mr Ji.
42. Although the Tribunal acknowledges that the applicant has had personal challenges and the Tribunal takes this opportunity to express empathy towards the applicant, she is however an educated and resourceful woman and to contend that the provision of incorrect information was beyond her control underestimates and disrespects the many positive qualities and strengths of the applicant. The Tribunal has given regard to the diagnosis of [depression], however, looking at the evidence cumulatively, the Tribunal is not satisfied that the circumstances in which the non-compliance occurred mean that the visa should not be cancelled.

- ***the present circumstances of the visa holder***

43. The applicant is now in meaningful employment and she lives in rented accommodation with her son who is doing well at school. In her Statutory Declaration of 26 June 2018, she claimed that she had used the divorce application as a tool to ask Mr Ji to remain in Australia and not to go to Japan.
44. The applicant has claimed that despite their divorce, she and Mr Ji continue to be in contact. She gave evidence that she lodged the divorce application not specifically to get a divorce but to try to prevent Mr Ji from pursuing his studies in Japan. She thought that the threat of divorce would stop him from leaving Australia but it did not. She gave evidence that she and Mr Ji have engaged in sexual activities subsequent to their divorce. She stated when she went to Japan in 2016, she stayed at his place. She stated that she never considered the relationship with Mr Ji to have finished and that they made a deal that on his return to Australia from Japan, they would remarry.
45. Mr Ji gave evidence that he regrets the divorce and that they have continued to be in a relationship. He stated that they plan to get back together subsequent to his graduation in Japan this year. He stated that he plans to return to Australia, find employment and get back with the applicant.
46. The Tribunal discussed with the applicant the application for divorce. The Tribunal indicated that given the requirements to show 12 months separation prior to lodging the application, how she could say that this was an impulsive decision. The Tribunal asked the applicant about the information provided in the application for divorce and she stated that she and Mr Ji had been living separately. The Tribunal asked the applicant if she has a copy of her application for divorce and she stated that she does not. The Tribunal expressed concerns that it would appear that incorrect information might have been provided in the divorce application. The applicant provided responses that were incoherent raising concerns for the Tribunal. The applicant stated that a person by the name of Terry assisted her in the divorce application. She stated that he convinced her to apply for the divorce and that he had confessed to her his love. The Tribunal is not persuaded.
47. The evidence before the Tribunal is that Mr Ji is in Japan studying, despite the applicant's stated attempts to stop him. She gave evidence that he seemed indifferent about her feelings regarding future plans. The fact is that the applicant's divorce has now been granted and finalised. The Court granted the divorce subsequent to a lawful process, including being satisfied that the couple has lived separately and apart for at least 12 months and that there is no reasonable likelihood of resuming married life. It is not open to this Tribunal to go beyond the findings of the Court or to critically evaluate or question the conclusions and the orders of the Court.
48. Although the Tribunal acknowledges that relationships go through stages and that reconciliation after divorce is plausible, in consideration of the evidence as a whole, the Tribunal does not accept that the applicant and Mr Ji are currently in a relationship which requires the Tribunal's consideration in deciding whether the visa should be cancelled.
49. The Tribunal has carefully considered the applicant's current circumstances as a single mother who has a dependent child. The Tribunal has given those aspects some weight in favour of the applicant.

- ***the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act***

50. There is no evidence before the Tribunal raising concerns about the applicant's obligations under subdivision C.

- ***any other instances of non-compliance by the visa holder known to the Minister***

51. There is no evidence before the Tribunal of any other instances of non-compliance by the applicant.

- ***the time that has elapsed since the non-compliance***

52. The non-compliance occurred when the applicant lodged the Partner visa application on 17 August 2011. The Tribunal does not consider the seven-year period to be significant to mean that the visa should not be cancelled.

- ***any breaches of the law since the non-compliance and the seriousness of those breaches***

53. There is no evidence before the Tribunal of any breaches of the law since the non-compliance.

- ***any contribution made by the holder to the community.***

54. The applicant has claimed that she made contribution through her payment of income tax in Australia and for being actively involved in providing support and care for her son. She gave evidence that she donates to charity and that she is a blood donor.

55. The payment of tax is a lawful expectation. The applicant has been in Australia for a number of years and she has been entitled to access benefits and public resources, funded through taxes. As the mother of her son, her involvement in providing him with care and support does not directly go to contribution to the community. The Tribunal acknowledges that caring for one's family does have an indirect impact on the community but that impact is difficult to measure. In any event, the Tribunal has given some weight to the applicant's stated contributions, including her donations to charity and being a blood donor. However, the Tribunal considers those contributions to be limited and do not mean that the visa should not be cancelled.

- ***Other matters***

56. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

- ***Whether there would be consequential cancellations under s.140***

57. The applicant's son, Master YANG Zhe (date of birth 15 December 2006) has held a subclass 101 child visa which was granted on 5 August 2015, on the basis of being sponsored by the applicant.

58. Section 140(2) provides that if:

59.

- *(a) a person's visa is cancelled under section 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133 (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas); and*
- *(b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held the Visa;*
- *the Minister may, without notice to the other person, cancel the other person's visa.*

60. The Tribunal considers that s 140 cancellation is an intended consequence of the legislation and reflects the objective that if a person was not entitled to hold permanent residency, anyone they sponsored on the basis of the permanent residency may also have the visa cancelled.

61. The evidence before the Tribunal indicates that the son's visa has been cancelled pursuant to s 140(2). The Tribunal acknowledges that by affirming the decision to cancel, this would potentially impact the son's visa.

62. Master Zhe is now 11 years old and he is doing well at school in Australia. He has lived in Australia for about two and half years. The Tribunal does not consider that time to be significant or that he has extensive ties with Australia.

63. There is no suggestion that the applicant and her son would be separated as it would be open to both of them, if their visas are cancelled to depart Australia. The Tribunal is of the view that Master Zhe is young enough to be able to readjust if he and his mother have to depart Australia. The applicant's parents who have both retired remain to live in China, although they visit her in Australia. Like his mother, the son is a Chinese national and on the evidence before the Tribunal, there is no impediment on him returning to his homeland where he spent many years. The Tribunal has taken into account that Master Zhe's father is serving a prison term in China but that does not mean that it is not in his interest to be back in China.

64. In relation to both the applicant and her son, the Tribunal is mindful that if the visas are cancelled, they may face deportation or detention until the resolution of their status. There may also be challenges to apply for further visas. The Tribunal is satisfied that these are intended consequences of the legislation and in the case of the applicant and her son, the Tribunal does not consider them to mean that their visas should not be cancelled.

- ***International obligations***

65. It has been contended by the applicant that cancellation would result in breach of Australia's obligations relating to the Convention on the Rights of the Child (CROC). The submissions contended that Australia's obligations pursuant to the CROC might be breached as the applicant is Master Zhe's guardian and consequently his interests could not be assured in case of separation from his mother because of potential detention consequences. The Tribunal has carefully considered those submissions but there is no suggestion that the applicant would be separated from her child as it would be open to her to return to China with her child. On the evidence before it, the Tribunal is not satisfied that there would be breach of Australia's international obligations, relating to the CROC or any other international instrument.

66. The Tribunal has considered the circumstances of both the applicant and her son and the Tribunal acknowledges that although there would be challenges that could face them on their return and it is plausible that Master Zhe may face a degree of bullying as a result of his father's circumstances, however the Tribunal on the evidence before it, is not satisfied that this would amount to serious or significant harm as contemplated by the Act. In consideration of the evidence as a whole, the Tribunal is not satisfied that there are non-refoulement obligations which would be breached.
67. In determining the review, the Tribunal has given regard to the report of Mr Gorrell. The Tribunal is satisfied that the applicant had a fair opportunity to put her case in full before the Tribunal and any evidentiary concerns are not related to her psychological status as outlined by Mr Gorrell.
68. The Tribunal acknowledges that the applicant may face challenges on her return to China such as finding employment, finding accommodation, and finding the school. However, on the evidence before it, the Tribunal is not satisfied that those challenges mean that the visa should not be cancelled.

69. **CONCLUSIONS**

70. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances individually and cumulatively, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

71. The Tribunal affirms the decision to cancel the first named applicant's Subclass 100 (Spouse) visa.
72. The Tribunal has no jurisdiction with respect to the other applicant.

73.

74.

75.

76. **Antoinette Younes**

77. **Senior Member**

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:

- (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.